United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 08-604**
	)	**Issued: August 13, 2008**
DEPARTMENT OF THE AIR FORCE, 375th AIR WING, SCOTT AIR FORCE BASE, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 9, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 27, 2007 that denied her claim and an October 17, 2007 decision that denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a stress-related condition in the performance of duty causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 26, 2006 appellant, then a 54-year-old management and program analyst, filed a Form CA-2, occupational disease claim, alleging that factors of her federal employment

caused stress, stating that she was verbally relieved of duty as chief on September 9, 2005 and was not assigned duties or reassigned to another position until May 28, 2006. She did not stop work.

In an attached statement, appellant described specific incidents that she felt caused her condition, noting that she had transferred to the employing establishment in June 2004 and inherited a staff of two military officers and three civilians, including Charley Mills who had expected to be promoted into her position. She stated that Mr. Mills and the staff resented her for that reason and that Mr. Mills repeatedly told her in front of others that she was not qualified for the position. Appellant further described problems with Captain Ivery who refused to work with her and countermanded her orders to military personnel, noting that military personnel were treated differently than civilian employees. When she complained to her supervisor, Colonel Colon, he advised her to try and get along with people. After Colonel Colon retired, he was replaced by Colonel Raymond Rottman who discussed personnel issues with appellant on July 21, 2005, stating that her staff was not happy with her and she needed to improve. Appellant also alleged that she was undermined by Lieutenant Colonel Jim Meeks who directed her military staff and undermined her leadership and that on August 3, 2005 she had a confrontation with Lynn Stadts, a civilian employee, concerning use of space. She stated that, at a September 9, 2005 meeting, Colonel Rottman told her he was transferring her because of her poor management style but that she would keep her pay and grade. Appellant noted that this was humiliating to her and that on September 10, 2005 Colonel Rottman announced the change to the staff. She described a confrontation with Lieutenant Colonel Doye Robbins on October 4, 2005 because he would not certify overtime and requested that she return a tablet computer. Appellant stated that she was inappropriately reassigned on May 28, 2006 to a position with diminished responsibility after not having any assigned duties since September 9, 2005 and that on June 13, 2006 she was informed that she was to groom the current deputy, Major Tammy D. Pokorney, for the position of chief and that this caused an anxiety attack because she had hired and trained the deputy. She generally alleged that she was treated as a second-class citizen and concluded that she was currently working in a stressful situation with insufficient staff.

In support of her claim, appellant submitted a July 13, 2006 statement in which Timothy M. West, a coworker, reported that from June to September 2005 appellant was chief of wing plans and readiness and that in September 2005 she was removed and replaced by a military member, that, from September 2005 until June 2006, he was unaware of duties or responsibilities assigned to appellant, that she did not supervise employees or attend meetings. In a September 15, 2006 statement, Mr. Mills noted that in September 2006 [sic] appellant was replaced as chief of wing plans by Lieutenant Colonel Robbins who had zero background and required experience. He opined that during the next nine months appellant was not effectively utilized and that Lieutenant Colonel Robbins made several statements that he did not want her in his office and that she was now in the precarious situation of being supervised by an individual she personally interviewed and hired, noting that there was tension between the two.

In a July 27, 2006 report, Dr. Deborah K. McDermott, an internist, noted that appellant had been complaining of depression since November 2005. She stated that appellant appeared somewhat depressed and anxious and that her symptoms corresponded with stress and anxiety which "are probably related to stress in the workplace." In an August 23, 2006 report, Dr. Sultan A. Hayat, Board-certified in internal medicine and cardiovascular disease, advised

that three months previously appellant began to have exertional dyspnea and exertional chest discomfort with heart pounding. He advised that his "strong clinical impression" was that her symptoms were produced by stress at work.

By letters dated October 18, 2006, the Office informed appellant of the type evidence needed to support her claim and asked that the employing establishment respond. By letter dated November 15, 2006, Major Pokorney, chief of wing plans, programs and readiness, noted that she had been appellant's direct supervisor since September 15, 2006 and had worked closely with her since July 2005. She stated that "perceptions of conflict with employees and [appellant's] supervisor were apparent in the tension and stress of the office environment." Major Pokorney stated that attempts were made to reduce the stress through reassignment of personnel and one-on-one discussions with employees and supervisors but that the tension remained in a period of increasing workload. She stated that appellant performed duties consistent with her position description and that her removal from a leadership position was deemed critical by wing leadership. Major Pokorney concluded that the circumstances and not appellant's personal actions led to the reassignment.

Appellant submitted copious evidence regarding a claim filed with the Merit Systems Protection Board (MSPB), a complaint to the Office of Special Counsel (OSC) alleging prohibited personnel practices, position descriptions, Form 50s and correspondence. In a letter addressed to Senator Barack Obama's office dated April 11, 2006, Lieutenant Colonel Karen L. Cook, advised that the wing commander spoke to appellant on a number of occasions regarding her leadership skills and the problems in her office which were having a negative impact on the wing's mission and that, as a result of these repeated discussions, the commander decided to reassign appellant from her supervisory position into a nonsupervisory position and as this was at the same grade level, it was not an adverse action. Lieutenant Colonel Cook stated that the commander felt appellant was not effective as a leader and that strong leadership was needed. She noted that an "official personnel action" was not taken because a permanent position was not found for appellant. Lieutenant Colonel Cook concluded that the commander's decision to reassign appellant "was appropriately taken for mission reasons and took into consideration her value to the organization and the Air Force." A May 24, 2006 e-mail from employing establishment personnel informed appellant that on May 23, 2006 a personnel action had been submitted.

A memorandum dated May 30, 2006 to appellant, from Colonel Dawn E. Wilson noted that appellant was being reassigned effective May 28, 2006. Colonel Wilson stated that the reassignment was driven by mission needs, noting that other wings had found this alignment beneficial; thus, the base and agency were better served by utilizing a military member as chief and that this structure was highly conducive to the success of the operational mission. By decision finalized on August 24, 2006, the MSPB dismissed appellant's case for lack of jurisdiction because reassignments without a loss of grade or pay are not appealable to MSPB.

In an April 27, 2007 decision, the Office denied appellant's claim finding that, as she had not established a compensable factor of employment, she had not established that she sustained an injury in the performance of duty. On July 31, 2007 appellant requested reconsideration, arguing that the evidence of record established that she sustained an injury in the performance of

duty.[1] She submitted copies of evidence previously of record and an e-mail regarding "WC Stress Letter followup" in which Major Pokorney stated, "I have read the information and adjusted the text, font, spacing. To my knowledge, all the information is accurate." Appellant also submitted an August 28, 2007 report in which Dr. Harvey L. Mirly, a Board-certified orthopedic surgeon, reported on her left carpal tunnel condition. In a nonmerit decision dated October 17, 2007, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

To establish her claim that she sustained a stress-related condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her condition.[2]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[3] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[5] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[6] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[7]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially

[1] Appellant also described factors that occurred after the instant claim was filed that are not pertinent to the instant claim.

[2] *Leslie C. Moore*, 52 ECAB 132 (2000).

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Robert W. Johns*, 51 ECAB 137 (1999).

[6] *Lillian Cutler, supra* note 3.

[7] *Roger Williams*, 52 ECAB 468 (2001).

assigned work duties of the employee and are not covered under the Act.[8] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[9]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that she sustained a stress-related condition in the performance of duty causally related to factors of her federal employment.

The main thrust of appellant's allegations is that she was improperly removed from her supervisory position in September 2005 and permanently reassigned to a nonsupervisory position in May 2006. Personnel matters although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act, absent error or abuse.[11] An employee's dissatisfaction with being transferred or reassigned constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is also not compensable.[12] Major Pokorney and Lieutenant Colonel Cook explained that it was in the best interest of the employing establishment's mission to assign military rather than civilian personnel to the chief's position. Lieutenant Colonel Cook also explained that discussions were held with appellant regarding her lack of leadership skills. Supervisory discussions of job performance and reprimands are administrative or personnel matters of the employing establishment which are covered only by a showing of error or abuse.[13] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[14] Mere disagreement or dislike of a management action will not

[8] *Charles D. Edwards*, 55 ECAB 258 (2004).

[9] *Kim Nguyen*, 53 ECAB 127 (2001).

[10] *James E. Norris*, 52 ECAB 93 (2000).

[11] *Id*.

[12] *Robert Breeden*, 57 ECAB 622 (2006).

[13] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[14] *Cyndia R. Harrill*, 55 ECAB 522 (2004).

be compensable absent error or abuse[15] and there is no evidence of error or abuse in this case regarding the September 2005 removal or the May 2006 transfer. Appellant also asserted that her lack of official duties from September 2005 to May 2006 caused her condition and Mr. Mills noted that he did not think appellant was effectively utilized during this period. The assignment of work is also an administrative function of the employing establishment and not a duty of the employee.[16] Appellant also contended that Lieutenant Colonel Robbins inappropriately denied overtime and asked that she return a tablet computer. The handling of attendance matters is also an administrative function of the employer and absent error or abuse, not compensable.[17] The Board finds that it was reasonable for the employing establishment to request the tablet computer when her job duties changed[18] and as appellant has not demonstrated error or abuse in these administrative matters, they are not be compensable.

Regarding appellant's contention that she had inadequate staff in her new position, this too is a personnel matter and an administrative function of the employer.[19] She did not allege that she was overworked and other than her contention and Major Pokorney's comment about an increasing workload, there is no further evidence of record regarding this contention. All allegations must be established on a factual basis to be compensable[20] and the Board finds Major Pokorney's comment is too general in nature to establish error or abuse regarding this employment matter.[21]

Regarding appellant's allegation that she had a confrontation with Ms. Stadts on August 3, 2005, verbal altercations when sufficiently detailed by the claimant and supported by the record may constitute a compensable factor of employment.[22] There is nothing in the record here to support that this incident did in fact occur[23] and it would therefore not be a compensable factor of employment.

As to appellant's general allegation that she was harassed by Mr. Mills, Lieutenant Colonel Meeks, Captain Ivery and other personnel, for harassment or discrimination to give rise to a compensable disability, there must be evidence that establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred

[15] *T.G.*, 59 ECAB ____ (Docket No. 06-1411, issued November 28, 2006).

[16] *Linda K. Mitchell*, 54 ECAB 748 (2003).

[17] *Joe M. Hagegood*, 56 ECAB 479 (2005).

[18] *Cyndia R. Harrill*, *supra* note 14.

[19] *David C. Lindsey, Jr.*, *supra* note 13.

[20] *See Sherry L. McFall*, 51 ECAB 436 (2000).

[21] *Kim Nguyen*, *supra* note 9.

[22] *David C. Lindsey, Jr.*, *supra* note 13.

[23] *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006).

with probative and reliable evidence. With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the Equal Employment Opportunity Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.[24] In the case at hand, appellant submitted no evidence to substantiate harassment on the part of Mr. Mills or other member of the employing establishment staff. While she submitted statements from Mr. Mills and Mr. West, these do not support that harassment in fact occurred but rather describe her positions and duties at the employing establishment.[25] In this case, there is no affirmative evidence of record to establish that anyone at the employing establishment committed any action that constituted harassment.[26]

Likewise, appellant's contention concerning lack of support by Colonel Colon would not be compensable. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.[27] Appellant submitted no evidence to show error or abuse regarding this matter.

Lastly, appellant indicated that she had filed an MSPB claim and a claim alleging prohibited personnel practices with the OSC. In assessing the evidence, the Board has held that complaints to other agencies, by themselves, do not establish that workplace harassment or unfair treatment occurred.[28] The MSPB dismissed appellant's claim for lack of jurisdiction and the record before the Board does not contain any decision from the OSC. Appellant therefore did not establish harassment or discrimination on the part of the employing establishment.[29] As she identified no compensable work factors substantiated by the record,[30] she failed to establish that she sustained an injury in the performance of duty.[31]

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[24] *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007).

[25] *Joe M. Hagegood, supra* note 17.

[26] *See Charles D. Edwards, supra* note 8.

[27] *T.G., supra* note 15.

[28] *See Michael L. Deas*, 53 ECAB 208 (2001).

[29] *James E. Norris, supra* note 10.

[30] *Roger Williams, supra* note 7.

[31] *Id.* Because appellant failed to establish a compensable employment factor, it was not necessary to consider the medical evidence. *Marlon Vera*, 54 ECAB 834 (2003).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[32] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[33] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[34] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[35]

ANALYSIS -- ISSUE 2

In her request for reconsideration, appellant merely reiterated that the evidence submitted was sufficient to establish employment-related stress. She therefore did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[36]

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted evidence previously of record and evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[37] She also submitted an August 28, 2007 medical report from Dr. Mirly concerning her carpal tunnel syndrome condition. The merit issue in this case is whether appellant established a compensable factor of employment. The Board has held that the submission of evidence that does not address the particular issue involved in a case does not constitute a basis for reopening the claim.[38] Appellant also submitted a copy of an e-mail dated November 28, 2006 regarding her stress claim in which Major Pokorney stated that she had read the information and adjusted the text, font and spacing and that "to my knowledge, all the information is accurate." The

[32] 5 U.S.C. § 8128(a).

[33] 20 C.F.R. § 10.608(a).

[34] *Id*. at § 10.608(b)(1) and (2).

[35] *Id*. at § 10.608(b).

[36] *Id*. at § 10.606(b)(2).

[37] *See D'Wayne Avila*, 57 ECAB 642 (2006).

[38] *Id*.

Board finds this e-mail is of such vague and generalized nature that it is not relevant or pertinent to appellant's claim that she established compensable factors of employment.[39]

Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office and it properly denied her reconsideration request by its October 17, 2007 decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a stress-related condition in the performance of duty and that the Office properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 17 and April 27, 2007 be affirmed.

Issued: August 13, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[39] *Robert Breeden, supra* note 12.